IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2006

JESSE ANDREW WILLIAMS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Johnson County
No. 4623 Robert E. Cupp, Judge

No. E2005-02151-CCA-R3-HC - Filed August 3, 2006

The petitioner, Jesse Andrew Williams, appeals pro se from the Johnson County Criminal Court's denial of his petition for the writ of habeas corpus. The petitioner is presently serving a sentence of life plus five years for his conviction for first degree murder committed with a firearm. He claims he is entitled to the writ of habeas corpus because (1) the indictment underlying his conviction is void because it charges two offenses in a single count, and (2) the trial court was without jurisdiction to impose a sentence of life plus five years for a single conviction. Because the lower court properly denied relief, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER. JJ., joined.

Jesse Andrew Williams, Mountain City, Tennessee, pro se.

Paul G. Summers, Attorney General and Reporter; and Blind Akrawi, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was convicted by a Madison County jury of the first degree murder of a high school classmate. The petitioner was a juvenile at the time of his crime but was tried as an adult. The evidence at trial showed that he shot a classmate between the eyes with a pistol. On direct appeal, this court affirmed his conviction. See State v. Williams, 784 S.W.2d 660 (Tenn. Crim. App. 1989), app. denied (Tenn. Feb. 5, 1990).

This habeas corpus action ensued. In the present case, the lower court considered the petitioner's claims and dismissed them without a hearing. The court concluded that the indictment, which alleged first degree murder committed with a firearm, charged only one offense, and that the

statutory five-year enhancement that was applied to the petitioner's sentence was in effect at the time of the offense.

The trial court may summarily dismiss a petition for writ of habeas corpus relief when the petitioner does not state a cognizable claim. Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004). A petition for the writ of habeas corpus may only be brought if the judgment is void or the sentence has expired. Archer v. State, 851 S.W.2d 157, 163-64 (Tenn. 1993). However, if the claimed illegality renders the judgment or sentence voidable, rather than void, no relief can be granted. Id. at 161. A sentence imposed in direct contravention of a statute is illegal and void. Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000). The determination of whether relief should be granted is a question of law which this court reviews de novo. Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000).

I

We consider first the petitioner's claim that the judgment against him is void because the indictment charged two offenses in a single count. The record reflects that the single-count indictment charged the petitioner with first degree murder "by shooting [the victim] with a pistol" in violation of Tennessee Code Annotated sections 39-6-1710 and 39-2-202. At the time of the petitioner's offense in December 1987, section 39-6-1710(a)(1) prescribed increased punishment for a defendant found guilty of "employ[ing] any firearm or any explosive device while committing or escaping from a felony . . . ." The additional punishment was five years for a first offense and ten years for subsequent offenses, and this punishment was required to be imposed consecutively to any other felony sentence. T.C.A. § 39-6-1710(a)(1), (3) (1982) (repealed 1989). Section 39-2-202 was the first degree murder statute in effect at the time of the petitioner's crime.

Former section 39-6-1710(a)(1) stated, "Any person who employs any firearm or any explosive device while committing or escaping from a felony is guilty of a felony . . . ." However, our supreme court has held that this section, then codified at section 39-4914, did not create a separate offense but rather prescribed additional punishment. See State v. Hudson, 562 S.W.2d 416 (Tenn. 1978). As the court in Hudson explained

> The obvious purpose of this enactment was to provide additional punishment for one who employs a firearm as a means of committing a felony. It could have been achieved more easily if the legislature had not included the language " . . . is guilty of a felony, . . . " It certainly was not necessary to include that language in order to provide such additional punishment. To give a literal interpretation to the quoted phrase results, of course, in the conclusion that this statute creates and defines a new felony that is separate and distinct from the "principal" felony which is committed by means of a firearm. But such a construction would result in a statute that could not be applied as the legislature intended without running afoul of the

> double jeopardy prohibitions of our state and federal constitutions. Separate convictions for the "principal" felony and the new use of a firearm felony could not stand without violating the double jeopardy clause. Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed.2d 187 (1977); Woofter v. O'Donnell, Nev., 542 P.2d 1396 (1975); Raby v. State, Nev., 544 F.2d 895 (1976). In short, if the statute were so construed it would be self-defeating and nugatory. Accordingly, we conclude that the statute should be given a construction that will render it both constitutional and effective to carry out the obvious legislative intent.
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> We hold that this statute does not create a new felony, but, instead amends by implication our other felony statutes, with the exception to be discussed, infra,[1] by adding a proviso to each such statute that if such felony is committed by means of using a firearm the offender shall, in addition to the punishment regularly prescribed for such felony, be further punished as set out in this statute, T.C.A., § 39-4914.

Hudson, 562 S.W.2d at 418-19 (footnote added). Applying Hudson to the case at bar, the petitioner was charged with only one offense, first degree murder by use of a firearm. Therefore, his claim that his indictment is void because it charges him with two offenses in a single count is based upon an incorrect premise. The lower court properly denied relief.

II

We turn to the petitioner's claim that the trial court was without jurisdiction to impose a sentence of life plus five years for his conviction because Code section 39-6-1710 was inoperative for crimes committed after passage of the Criminal Sentencing Reform Act of 1982. The petitioner relies on an expansive interpretation of State v. Bottenfield, 692 S.W.2d 447 (Tenn. Crim. App. 1985) to support his claim. The defendant in Bottenfield was convicted of voluntary manslaughter by use of a firearm. Bottenfield, 692 S.W.2d at 448. This court reversed and dismissed her conviction based upon insufficiency of evidence. Id. at 451-52. Notwithstanding that disposition, the court addressed the defendant's claim that after the 1982 Act was effective, the provision of section 39-6-1710(a)(2), which prohibited suspension, deferral, withholding, or parole of an enhanced sentence imposed under section 39-6-1710, was of no effect. Bottenfield, 692 S.W.2d at 453; see T.C.A. 39-6-1710(a)(2) (repealed 1989). This court agreed, stating that the provisions of the 1982 Act which permitted a reprieve from day-for-day service of a sentence rendered the contrary provisions of the prior statute inoperative. Bottenfield, 692 S.W.2d at 453. However, this court also said that had the defendant's enhanced sentence been otherwise valid, that is, had it not been

[1]The exception, which is not relevant to the petitioner's case, was for felonies which already increased punishment for use of a firearm. Hudson, 562 S.W.2d at 419.

obviated by the court's dismissal of the defendant's conviction, the enhanced sentence would have been subject to the 1982 Act. Id. Thus, the court never said that the enhancement provision of subsection (a)(1) or the mandatory consecutive service provision of subsection (a)(3) was inoperative; indeed, it implied the contrary. See id. This court has, on other occasions, applied a consistent interpretation to questions of the viability of the provisions of section 39-6-1710 other than subsection (a)(2). See, e.g., Otha Bomar v. State, No. 01C01-9607-CR-00325, Davidson County, slip op. at 8-9 (Tenn. Crim. App. Oct. 30, 1997) (relying on narrow interpretation of Bottenfield as applying only to T.C.A. § 39-6-1710(a)(2) in rejecting post-conviction petitioner's claim that he received an improper enhanced sentence for crime occurring after effective date of Criminal Sentencing Reform Act of 1982); State v. Meeks, 779 S.W.2d 394, 396-97 (Tenn. Crim. App. 1988) (holding that in accord with Bottenfield, T.C.A. § 39-6-1710(a)(2) did not prohibit defendant convicted of involuntary manslaughter by use of firearm from consideration for probation under Criminal Sentencing Reform Act of 1982).

We, like the lower court, are unpersuaded that the trial court was without jurisdiction to sentence the petitioner to life plus five years based upon the petitioner's interpretation of the breadth of the holding in Bottenfield. In the wake of the Criminal Sentencing Reform Act of 1982, Code section 39-6-1710 was still a viable means for imposing an enhanced punishment for certain offenses committed with a firearm. Thus, the petitioner was not improperly sentenced under this Code section.

In consideration of the foregoing and the record as a whole, the judgment of the lower court is affirmed.

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JOSEPH M. TIPTON, JUDGE